No. 86-828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHWESTERN SHEET METAL WORKS, INC.
Petitioner,

v.

SEMCO MANUFACTURING, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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February 13, 1987

QUESTIONS PRESENTED

1. Whether a manufacturer which negotiates a more favorable labor contract with a union than a competitor and who submits lower bids on some jobs than the competitor is liable in damages, where the competitor proves that his profits declined during the time the contract was in effect but does not offer any evidence that but for the alleged violation of the antitrust laws there would not have been a reduction in profits.

2. Whether the opinion of the Fifth Circuit Court of Appeals correctly holds that in order to establish the fact of damage in an antitrust case the plaintiff must prove that the alleged violation of the antitrust laws by the defendant was a material cause of his injury.

LIST OF PARTIES AND OTHER INTERESTED PERSONS

The parties to the proceedings below were the Petitioner, Southwestern Sheet Metal Works, Inc., the Respondent, Semco Manufacturing, Inc., and Henry V. Mesa. Mesa, co-defendant in the district court, was not a party to the Fifth Circuit appeal, and is not before the Court as a party to these proceedings.

The following persons and entities not listed in the caption have an interest in the outcome of these proceedings. These representations are made for purposes of consideration in evaluating possible disqualification or recusal.

Henry V. Mesa, Defendant (Non-Appealing).

Limbach Incorporated, Parent of Semco Manufacturing, Inc.

Sheet Metal Workers International Association.

Local 49 of the Sheet Metal Workers International Association, Successor to Local 188.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Semco Mfg., Inc., Respondent, submits this Brief in Opposition to the Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit filed by Southwestern Sheet Metal Works, Inc., Petitioner. Respondent respectfully requests that the Court deny the Petition because the opinion of the Fifth Circuit, reported at 788 F.2d 1144 (5th Cir. 1986), correctly states the burden of proof which a plaintiff must meet in a private antitrust action to establish the fact of damage or injury in fact. The Petition also should be denied because the judgment of the court below is right and because the Respondent did not offer evidence sufficient to prove the fact of damage in accordance with the standards set out in the applicable decisions of the Court.

Petitioner and Respondent are sometimes referred to as "Southwestern" and "Semco," respectively.

STATEMENT OF THE CASE

Semco is a subsidiary of Limbach Incorporated, a company engaged in construction and other businesses. Semco manufactures products for the heating and air conditioning industry. Semco opened a new plant in Sunland Park, New Mexico, near El Paso, Texas, and negotiated a labor agreement in October 1980 with Local 188 of the Sheet Metal Workers' International Association in El Paso, acting through its Business Manager, Henry Mesa. Semco and Mesa are the defendants and alleged co-conspirators.

Southwestern, located in El Paso, competes with Semco in the manufacture of spiral pipe and fittings. During the time in question Southwestern also had a labor agreement with Local 188, effective July 1, 1979, which did not terminate until June 30, 1981. Southwestern's complaint is that Semco's October 1980 agreement with the Local afforded it an advantage in bidding for jobs because it permitted the use of "production workers," who are paid less than "journeymen" or "apprentices," while Southwestern's agreement in effect at the time, unlike its earlier agreement, did not contain such a provision. According to Southwestern, Semco thus was enabled in some instances to submit lower bids, which resulted in a decline in Southwestern's sales and profits.

Southwestern, with knowledge of the Semco October 1980 agreement, negotiated a new labor agreement with the Local, effective July 1, 1981, upon the expiration of its 1979 agreement. The new Southwestern agreement, however, negotiated with Mesa's successor who was not a member of

the alleged conspiracy, did not contain a provision permitting the use of production workers. In September 1981 Southwestern negotiated a third agreement, replacing the July 1, 1981 agreement, which did contain a production worker provision.

Southwestern offered evidence that its sales and profits declined during the time that the Semco October 1980 agreement was in effect. Through an expert witness it also offered opinion evidence that it would have been able to submit lower bids on some jobs which it bid against Semco if it had a labor agreement permitting the use of production workers. However, it did not offer evidence that it would have been the successful bidder on any job on which its bid, as recalculated by its expert witness assuming the use of production workers, would have been lower than that submitted by Semco. Other companies in competition with Semco and Southwestern, including but not limited to United-McGill Corporation, which had opened a new plant in Hillsboro, Texas, in 1980, also submitted competitive bids and were awarded contracts on jobs which were bid by both Semco and Southwestern. United-McGill's labor agreement allowed the use of lower paid workers classified as "specialists" and its composite wage rate was lower than that of Semco.

During the time in question Southwestern made management changes, purchased new equipment, instituted new production procedures and changed the manner in which it estimated jobs. Southwestern admitted that these factors affected its profits.

Typically Semco and Southwestern submitted their bids to contractors, who purchased components and supplies from them and from other manufacturers and suppliers

which were then "packaged" by the contractor in a single bid for a contract to do the heating or air conditioning work on a construction project. If the contractor, whose bid price was based on the bids submitted to him by Semco, Southwestern and others for components of the total bid package, was successful in obtaining the contract, then their bids might be accepted if they were the lowest bidder.

There was evidence that Semco and Southwestern sometimes bid on only part of the work available for bidding. However, Southwestern's expert witness admitted that he did not examine the bids submitted by Semco and Southwestern on any job to determine whether they actually had bid on the same scope of work. Therefore he was unable to say whether the bids of Southwestern which he had hypothetically adjusted were in fact comparable.

Southwestern brought its claim against Semco and Mesa as an action under the antitrust laws on the theory that the October 1980 agreement between Semco and the union was an unreasonable restraint of trade which caused it injury.

REASONS FOR DENYING THE WRIT

I. *Petitioner Has Incorrectly Stated The Burden of Proof of The Fact of Damage*

Petitioner has incorrectly stated the standard of proof necessary to establish the fact of damage, or injury in fact, by failing to distinguish between an antitrust plaintiff's burden of proof of the fact of damage and his burden in proving the amount of damages. The burden of proof necessary to establish fact of damage is significantly different than that for the amount of damages. *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U.S. 555, 562 (1931). The term "fact of damage" can be likened to the

causation element in a negligence cause of action. *State of Alabama v. Blue Bird Body Company, Inc.*, 573 F.2d 309, 317 (5th Cir. 1978). It simply means that the plaintiff must prove that the antitrust violation caused injury to him. *Perkins v. Standard Oil Company of California*, 395 U.S. 642, 648 (1969). Although he need not prove that it was the sole cause of his alleged injury, he must show that the violation was a material cause. *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, n.9 (1969). This showing may not be based upon speculation. Rather, the causal link must be proved as a matter of fact and with a fair degree of certainty. Mere proof of a violation of the antitrust laws and proof that the plaintiff has suffered some damages is insufficient to prove a cause of action under the antitrust laws, since such proof establishes only that injury *may* have, not that it *did*, result from the violation. *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1977).

On the other hand, once the fact of damage has been proved, the amount of the plaintiff's damages caused by the defendant's violation may be established under a more lenient burden of proof. As the Court has said, the rule which precludes the recovery of uncertain damages applies to those damages which "are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount." *Story Parchment*, 282 U.S. at 562. While the jury may not render a verdict based on speculation or guesswork, it may make a just and reasonable estimate of the amount of damage based on relevant data and render its verdict accordingly, relying on probable and inferential as well as upon direct and positive proof. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

The distinction between fact of damage and the amount of damages is crucial. Difficulty of ascertainment is not to be confused with right of recovery, which depends upon proof of causation. If the damage is certain, the fact that its extent is uncertain does not prevent a recovery. *Story Parchment,* 282 U.S. at 566. It is precisely this distinction which the Petition obscures. Petitioner takes the position that a plaintiff need prove only a violation of the antitrust laws by the defendant and that he suffered injury of "the type likely to be caused" by the violation. (Petition at 3, 22). Principal reliance is placed on *Zenith Radio, Bigelow, Story Parchment* and *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation,* 451 U.S. 557 (1981). However, both *Bigelow* and *Story Parchment* are amount of damage rather than fact of damage cases, and that part of the Court's opinion in *Zenith* which has been quoted by Petitioner (Petition at 3) also relates to the burden of proving the amount of damages rather than the fact of damage, as indicated both by its context and the citation of *Bigelow, Story Parchment* and *Eastman Kodak Company v. Southern Photo Materials Company,* 273 U.S. 359, 377-379 (1927), as supporting authority.

Petitioner's reliance on *J. Truett Payne* is equally misplaced. Although some of the language in the opinion may seem to relate in a general way to proof of the fact of damage, the only question presented in that case, as noted in the first paragraph of the opinion, was "the appropriate measure of damages in a suit brought under §2(a) of the Clayton Act, as amended by the Robinson-Patman Act." *J. Truett Payne,* 451 U.S. at 559. Furthermore, its applicability to the case at bar, which arises under §1 of the Sherman Act, is all the more questionable since, unlike the Sherman Act, §2(a) of the Robinson-Patman Act "is violated merely upon a

showing that the effect of such (price) discrimination *may be* substantially to lessen competition." *Id.* at 561. (Emphasis by the Court).

What the opinions relied upon by Petitioner have to say, therefore, concerning an alleviated burden of proof on private antitrust plaintiffs relates only to the burden of proving the amount of damages and not to the proof required to establish the fact of damage or causation. By contrast, the questions presented in this case relate solely to the burden of proving the fact of damage. The issue of the burden of proof as to the amount of damages was not the basis of the decision by the court below, was not discussed in the opinion and is not before the Court.

This fundamental misreading of the law underlies all of the reasons advanced for granting the writ and is fatal to Petitioner's position. However, as hereinafter noted, a writ of certiorari should not be granted in this case, assuming that the Petitioner is right in its view on the burden of proof issue, because the judgment of the court below is correct, even if the reasons set forth in the court's opinion are wrong. Further, Petitioner misreads and misconstrues the Fifth Circuit's opinion. In actual fact the court only reaffirms the settled rule that the antitrust violation must be shown to have caused injury to the plaintiff before he is entitled to recover damages.

II. *Petitioner's Evidence Did Not Meet The Burden of Proof Required To Establish Fact of Damage*

Petitioner contends that it "offered evidence of Semco's wrongful conduct, a simultaneous loss of business, and declining profit values of exactly the type Semco's breach was likely to cause" and that its evidence "supports inferences that Southwestern would have won specific projects

absent Semco's bidding advantage; that Southwestern received less profit because Semco's behavior compelled it to slash its bids to compete with Semco; and that Southwestern lost substantial business through the duration of Semco's exclusive wage agreement." (Petition at 8). It contends that such evidence, without more, is sufficient to establish the fact of damage. Assuming for the sake of argument that this is an accurate characterization of the evidence, it still fails to meet the required burden of proof.

In support of its position Petitioner cites *Story Parchment.* As previously noted, however, that case dealt solely with the proof necessary to establish the amount of damages once an antitrust plaintiff has met his burden of proving injury in fact. As the Court observed, "... there was uncertainty as to the extent of damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment,* 282 U.S. at 562.

The quotation from *Story Parchment* (Petition at 8) not only is lifted out of context in an effort to make it appear that the Court is addressing proof of fact of damage, a key phrase ("in any measurable degree") is ignored. At this point in the opinion the Court was discussing the "second item of damages," which was the alleged depreciation in the value of the plaintiff's plant caused by the antitrust violation. The court below had held that the depreciation in value of the plaintiff's plant had not been proved to be due "in any measurable degree" to any violation of the Sherman Act by respondents. The only question presented was whether the evidence was sufficiently certain to support the verdict of the jury as to the amount of such damage. The Court said:

> "That there was actual damage due to depreciation in value was not a matter of speculation, but a fact which could not be gainsaid. The amount alone was in doubt, and, in the light of the foregoing discussion as to the first item of damages, the proof is sufficiently certain and definite to support the verdict of the jury in that respect." *Story Parchment,* 282 U.S. at 567.

It is submitted that *Story Parchment* provides no support for the position that the evidence described in the Petition meets the burden of proof as to the fact of damage. All that the Court held was that such evidence satisfied the required burden for proving the amount of damages.

Petitioner also relies on *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.* If anything such reliance is even more misplaced than the citation of *Story Parchment* as authority for the Petitioner's position. In *Brunswick* the Court did not address causation or fact of damage, which was assumed. The sole question presented was whether the damages alleged constituted "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick,* 429 U.S. at 489 (Emphasis by the Court). The Court held that an antitrust plaintiff in order to recover treble damages must prove more than injury causally linked to the antitrust violation. The proof must show the type of injury that the antitrust laws were intended to prevent. *Brunswick* affords no support to Petitioner because it does not address — indeed it assumes — fact of damage. Thus *Brunswick* assumes the very fact in issue here.

Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983) is equally inapposite. The plaintiffs in that case alleged violations of the antitrust laws and claimed that such "violations caused them $25 million in damages." *Associated General*

Contractors, Id. at 523-524. Since the complaint had been dismissed by the district court, the Court had to assume that the plaintiff could prove the facts alleged. *Id.* at 526. Having assumed fact of damage, the sole issue presented here, the Court held that no damages could be recovered because "allegations of consequential harm resulting from a violation of the antitrust laws, although buttressed by an allegation of intent to harm the Union, are insufficient as a matter of law." *Id.* at 545. *Associated General Contractors* has no more to do with the questions presented in the case at bar than does *Brunswick.* That damages may be recovered if the injury is of the type that the antitrust laws were intended to prevent does not relieve the plaintiff of the necessity to prove the fact of damage. The requirement of "antitrust injury" is simply an additional element which may defeat recovery even though the plaintiff has proved a violation of the antitrust laws and a causal link between such violation and his injury or damages. It does not support the Petitioner's claim that his evidence satisfied the burden of proof required to establish the fact of damage because his injury was the type that the antitrust laws were intended to prevent — thereby leap-frogging the requirement that the evidence must establish a causal link between the violation and the injury.

III. *Petitioner Has Misconstrued The Opinion of The Court of Appeals*

At the heart of the Petitioner's reasons why a writ of certiorari should be granted is the argument that the opinion of the Fifth Circuit constitutes a radical departure from the Court's instructions on placement and level of proof of the fact of damage in private antitrust actions (Petition at 12). This is a fundamental misreading of the opinion below,

which only reaffirms the settled rule that an antitrust plaintiff must prove that the violation caused his alleged injury. The Petitioner both mischaracterizes and ignores the evidence and misconstrues the Fifth Circuit's opinion in an effort to place it "at the front of an increasingly strident movement to constrict the scope of private antitrust claims by elevating the plaintiff's burden of proof" (Petition at 13.)

Respondent introduced evidence, not denied by Petitioner, that established the following facts: (1) on some of the jobs which, according to Petitioner's expert witness, Southwestern would have had a lower bid than Semco if Southwestern had had the benefit of Semco's labor agreement, another competitor made the lowest bid and received the work, and (2) Southwestern's costs increased markedly during the damage period because it made management changes, purchased new manufacturing equipment, changed the composition of its work force, began the use of mass production product runs and made changes in the method of estimating jobs, all of these changes impacting on Southwestern's profitability. Evidence also was introduced to show that on the only product manufactured by both Semco and Southwestern and on which they directly competed, production worker wages, which were the alleged unlawful wage advantage, were not used by Semco in estimating jobs. In fact, the evidence established that in 1982, when there was no asserted conspiracy and Southwestern had the same wage rates and use of production workers as Semco, the operating profit of its Sheet Metal Products Division had decreased from its actual level in 1981. In the face of this evidence that the decrease in its profits during the damage period were caused by factors other than Semco's supposed wage advantage, Southwestern did not offer evidence to show that on *any* job on which both bid, and on which

according to Southwestern's expert it would have been able to bid lower than Semco if it too had had the benefit of the alleged unlawful wage advantage, the job was awarded to Semco rather than to another competitor. In other words, there was absolutely no evidence that Semco actually got a job that Southwestern would have obtained but for the alleged violation of the antitrust laws. There simply was no evidence of a causal link between the violation and Petitioner's injury.

The Fifth Circuit has not adopted a burden of proof which conflicts with Supreme Court precedent or which elevates a private antitrust plaintiff's burden of proof of fact of damage. The court merely found that Petitioner's expert, who used a regression analysis to establish the fact of damage, did not present sufficient evidence of the fact of injury. The Fifth Circuit said in Part II of its opinion (Appendix 3):

> "Even if the adjusted Semco bid would have exceeded Southwestern's bid, Roth (Southwestern's expert) could not conclude that Southwestern would have received the bid . . . We find nothing in the record to indicate that of all bids submitted, Southwestern would have won the bid but for Semco's wage advantage. Southwestern's proof completely ignores *all other bidders.*" (Emphasis by the Court)

Roth's economic analysis also ignored numerous other factors which would have had an effect in the market place. His regression analysis was based on only three factors, and he totally ignored all other causes and factors which could have affected bidding and the competitive market situation.

Having ignored this evidence, Petitioner then misreads the opinion below as holding that "a bidder who alleges antitrust violations must establish affirmatively, that is to an absolute certainty, that no other bidder could have received a specific bid as a predicate to recovery" (Petition

at 10). According to Petitioner, the jury could reasonably infer on competitive jobs there were only two bidders or that only Southwestern's and Semco's bids were material to the award, although in the stipulated national market there were many competitors and many competitive bids.

What the Fifth Circuit actually held however, is summarized in the last paragraph of Part II of the opinion (Appendix 3). The Court said:

> At most, Southwestern's evidence of fact of injury suggests that something happened to Southwestern's profitability during 1981, that Semco was a competitor, and that Semco had an advantageous labor agreement. Not *one* instance is presented where, but for Semco's wage advantage, Southwestern would have won *or was likely* to have won. *Nor is there evidence that Semco's wage advantage exerted such an influence on other competitors' bidding that Southwestern had reduced profits.* Southwestern did not present sufficient evidence to lead reasonable and fair minded jurors to reach different conclusions; its evidence calls for speculation. The district court therefore erred in denying Semco's motion for a directed verdict." (Emphasis added)

Contrary to Petitioner's reading of the opinion, the court did not hold that Petitioner was "required to prove in its case-in-chief that the defendant's unlawful conduct was the sole proximate cause of its injury" (Petition at 18) or that an antitrust plaintiff "must rely on a specific lost sale (or bid)." (Petition at 21). A fair reading of the opinion does not support Petitioner's conclusion that it "requires a complete foreclosure of potential alternative sources of a Section 4 plaintiff's injury" (Petition at 19). What the court actually holds, and all that it holds, is that based upon the totality of the evidence in this case Petitioner failed to establish the causal link between the alleged violation of the antitrust laws and its injury. That is, it "did not present sufficient

evidence (of the fact of damage) to lead reasonable and fair minded jurors to reach different conclusions."

The opinion of the Fifth Circuit in this case is nothing more and nothing less than an affirmation of the well-established rule that the plaintiff must prove that the antitrust violation caused injury to him; and although he need not prove that it was the sole cause, he must show that it was a material cause of his injury. *Perkins,* 395 U.S. at 648; *Zenith,* 395 U.S. at 114, n.9. Mere proof of a violation of the antitrust laws and proof that the plaintiff has suffered some damages, which is the most that can be inferred from Petitioner's evidence, is insufficient, since it establishes only that his injury may have, not that it did, result from the violation. *Brunswick,* 429 U.S. at 486. The opinion below breaks no new antitrust ground, the arguments of the Petitioner to the contrary notwithstanding.

IV. *The Judgment of the Court of Appeals is Correct*

A writ of certiorari should not be granted because, in any event, the judgment of the court below is correct. Having found Southwestern's failure to establish the fact of damage to be dispositive, the Fifth Circuit limited its opinion to that single issue and did not consider other issues raised by Semco, as stated in Part I of the opinion.

The alleged antitrust violation in this case arises out of a labor agreement between a union and an employer. Specifically, Petitioner claims that it was injured in its business or property because the Business Agent of Local 188 of the Sheet Metal Workers' International Association entered into an agreement with Semco covering the wages, hours and working conditions of the employees of Semco, which contained a provision permitting the employment of

employees classified as "production workers" in the ratio of one apprentice and three production workers for each three journeymen. Although Southwestern formerly had an agreement with the union which allowed the use of production workers, its contract then in effect did not contain such a provision. Southwestern's complaint in this case is the availability to Semco of such lower wage rate production workers. It alleged and attempted to prove that as a result of Semco's labor contract, it had lower labor costs and was enabled to submit lower bids on some work than Southwestern was, thus causing it to lose jobs and reducing its profit.

It is clear that agreements entered into between a union and an employer in the context of a collective bargaining relationship cannot be the basis for antitrust liability, even though there are direct restraints on the business market which have substantial anticompetitive effects, both actual and potential, where such effects flow from the elimination of competition over wages and working conditions. *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975). See also *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Jewel Tea Company,* 381 U.S. 676 (1965). This exemption from the antitrust laws has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. *Connell,* 421 U.S. at 635. An agreement between a union and an employer falls outside the scope of the labor exemption and becomes subject to the antitrust laws only if the union agrees to surrender its freedom freely to negotiate as its own best interests may dictate and to take a certain predetermined position when it bargains with another employer. *United Mine Workers of America v. Pennington,* 381 U.S. 657, 668 (1965).

In the case at bar the labor exemption applies and there is no antitrust liability unless there was evidence that the union agreed that it would refuse to enter into an agreement with Southwestern for the use of production workers. There was no evidence nor any finding by the jury of such an agreement. All that the evidence shows is that Semco's October 1980 agreement with the union was in some respects a more favorable labor contract than Southwestern's then existing labor agreement, which was effective July 1, 1979 and was not reopenable until June 30, 1981. In fact, the union and Southwestern negotiated an agreement effective July 1, 1981, which did not provide for the use of production workers, despite the fact that the union was represented in the negotiations by the successor to Mesa as Business Manager who was not alleged to be a member of the conspiracy with Semco. Therefore there was no antitrust liability and the judgment of the court below was correct whether or not its holding on the burden of proving fact of damage was proper.

As indicated above, the evidence shows that Semco entered into an agreement with the union providing for the use of production workers, that Southwestern had a collective bargaining agreement effective July 1, 1979, which remained in effect until June 30, 1981, after alleged conspirator Mesa had ceased to have any authority to act for the union, and that Southwestern then negotiated a new agreement with the union, effective July 1, 1981, which did not provide for production workers. This is undisputed. Therefore, whether or not the labor exemption is applicable in this case, Southwestern was foreclosed from using production workers by its own collective bargaining agreements, not by Semco's contract with the union. Under the evidence the Semco October 1980 agreement, which is alleged to have

violated the antitrust laws, could not possibly have caused Southwestern's injury, if any. The causal link between the Respondent's alleged violation of the antitrust laws and the Petitioner's injury is lacking and the court below was correct in holding that Petitioner was not entitled to recover antitrust damages. A judgment in favor of Petitioner would simply reward it for its inability or failure to have negotiated in 1979 as good a labor agreement as Respondent was able to negotiate in 1980. If there was injury as a result, it is not the type of injury that the antitrust laws were intended to prevent. To impose liability under the circumstances would, in fact, be destructive of the very values which the antitrust laws were designed to protect.

The judgment of the court below is correct also because Southwestern's proof relied exclusively upon giving it the theoretical benefit of the alleged conspiratorial Semco October 1980 agreement negotiated with Mesa. The fact of damage, however, can be established only "by disregarding the special conspiratorial price . . . not by hypothetical broadening of the conspiracy to give (the defendant's) abnormally low price to (the plaintiff) as well." *M. C. Manufacturing Company, Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 (5th Cir. 1975), *cert. denied*, 424 U. S. 968 (1976). See also *Olympia Company, Inc. v. Celotex Corporation*, 771 F.2d 888, 892 (5th Cir. 1985). Thus, the evidence offered by Southwestern failed to prove the fact of damage since it was premised on giving Southwestern the benefit of Semco's alleged conspiratorial wage advantage and, as the Fifth Circuit held, the trial court erred in not granting Semco's motion for a directed verdict.

CONCLUSION

None of the reasons advanced by Petitioner justifies granting a writ of certiorari. The court below correctly held that an antitrust plaintiff must show that the defendant's violation of the antitrust laws was a material cause of his injury in order to establish the fact of damage or injury in fact. Unless the plaintiff satisfies this burden of proof he is not entitled to recover damages. The evidence offered by the Petitioner did not establish the essential element of causation. Furthermore, for the reasons heretofore stated, the judgment of the court of appeals was correct in any event, and for that additional reason the Petition should be denied.

The facts in this case are such that there is a serious question whether it should be treated as an antitrust cause of action in the first place, although the Petitioner attempts to cast his damage claim in an antitrust mold. Even if it is viewed as an antitrust case, however, the circumstances under which Petitioner's claim arises are so markedly different from the usual antitrust case that the decision below turns on its own unique facts and could affect few others than the litigants. It is respectfully submitted, therefore, that it would be an especially poor vehicle for the Court to use to explain or clarify the antitrust laws or to resolve perceived conflicts among the courts of appeals.

Respectfully submitted,

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February 13, 1987

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has served the foregoing Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed by Southwestern Sheet Metal Works, Inc., on Petitioner's counsel of record by mailing copies to the following persons:

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Such service was made on February 12, 1987.

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